No. 22-488

In the Supreme Court of the United States

DARRELL HEMPHILL, PETITIONER

v.

STATE OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

BRIEF FOR NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether an appellate court may excuse constitutional error as "harmless" on the basis of its judgment that the prosecution's evidence was "overwhelming" without engaging in the broader inquiry whether the error could have affected the jury's verdict.

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INTEREST OF *AMICUS CURIAE*[*]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit, voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of criminal misconduct. Founded in 1958, NACDL has a nationwide membership of many thousand direct members. NACDL is the only nationwide professional bar association for both public defenders and private criminal-defense lawyers, and its members include not only lawyers serving in those roles, but also private criminal-defense lawyers, military defense counsel, law professors, and judges. Consistent with NACDL's mission of advancing the proper, efficient, and fair administration of justice, NACDL files numerous amicus briefs each year in this Court and other federal and state courts—all to the end of providing assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

STATEMENT

The Court will recall the facts of this case from its previous decision in *Hemphill* v. *New York*, 142 S. Ct. 681 (2022), where the Court reversed the defendant's criminal conviction on Confrontation Clause grounds and remanded the case for harmless error analysis. In brief, a 2006 brawl on a Bronx street turned deadly.

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[*] No counsel for any party authored this brief in whole or in part, and no person other than the *amicus*, its members, or its counsel financially contributed to its preparation or submission. Pursuant to Rule 37.2, *amicus* gave notice of its intent to file the brief.

Somebody fired a 9-millimeter pistol, killing a child in a nearby car. The central question at trial was who fired the gun. *Id.* at 686-687.

The police searched the home of a suspect, Nicholas Morris, and found 9mm .357-caliber ammunition. *Ibid.* When the police arrested Morris, they observed bruising on his knuckles consistent with fist fighting. *Ibid.* Meanwhile, Morris's friend, Ronnell Gilliam, who took part in the altercation, surrendered to police, naming Morris as the gunman. *Ibid.* Moreover, three other eyewitnesses identified Morris as the shooter out of a lineup. *Ibid.* Yet Gilliam soon changed his story and named his cousin, Darrell Hemphill, as the shooter. *Ibid.* Choosing not to credit Gilliam's volte-face, the State charged Morris with the murder. *Ibid.* After the trial began, Morris and the State reached a plea bargain: Morris pled guilty to possessing a .357, and the State dropped the murder charge. *Ibid.*

Five years passed, at which point the State discovered that Hemphill's DNA matched DNA taken from a blue sweater that police had found in Gilliam's apartment shortly after the crime. *Ibid.* Witnesses had described the shooter as wearing a blue shirt or sweater. *Ibid.* Yet two more years went by before, in 2013, Hemphill was arrested and indicted for the murder. *Ibid.*

At trial, Hemphill contended that the State was right the first time: Morris was the real shooter. *Ibid.* After the jury heard evidence that police recovered both 9mm and .357 bullets from Morris's home, and that eyewitnesses had identified Morris as the shooter, the State sought to introduce evidence that Morris had ultimately pled guilty to possessing a .357. Morris was not available to take the stand, so in lieu of his

live testimony, the State proffered the transcript from his plea allocution. Hemphill objected. He argued that the transcript was hearsay and that he was being denied the opportunity to cross-examine Morris, in violation of *Crawford* v. *Washington*, 541 U.S. 36 (2004). See 142 S. Ct. at 687-688.

Citing *People* v. *Reid*, 971 N.E.2d 353 (N.Y. 2012)—a New York Court of Appeals case holding that a criminal defendant can "open the door" to evidence otherwise in violation of the Confrontation Clause if the evidence is "reasonably necessary to correct a misleading impression" made by the defense (*id.* at 357 (cleaned up))—the court admitted the transcript. As the trial court explained, although Hemphill's third-party culpability defense was a "necessary" argument under the circumstances, it nevertheless opened to door to unconfronted testimony. *Ibid.*

At closing arguments, Hemphill reiterated his theory that Morris was the shooter. The prosecutor then used the fact that Morris had pled guilty to the possession charge as affirmative evidence that he did *not* commit the murder, stating:

> And in the end, against the defense attorney's advice, Morris admits to possessing the 357 that day.
>
> Do you know why?
>
> Because that's the crime he actually committed on April 16, 2006. * * * He didn't have to plead guilty. He took responsibility for the crime he committed.

J.A. 356. The jury found Hemphill guilty, and the court sentenced him to 25 years to life in prison. *Ibid.*

Hemphill appealed. Both the New York Supreme Court, Appellate Division and the New York Court of Appeals affirmed. Hemphill then successfully sought certiorari from this Court, which reversed on Confrontation Clause grounds. The Court accepted the trial court's determination that Morris's allocution was "reasonably necessary" to "rebut [petitioner]'s theory that Morris committed the murder." 142 S. Ct. at 686 (citation omitted). But regardless of how "misleading" of an impression the defendant created or how "necessary" the unconfronted evidence was to rebut that impression, the Court held, the trial court violated the Confrontation Clause in admitting evidence against a criminal defendant without "testing in the crucible of cross-examination." *Id.* at 692-693 (quoting *Crawford*, 541 U.S. at 61).

Rather than address the State's harmless error argument, the Court remanded, in keeping with its "general custom of allowing state courts initially to assess the effect of erroneously admitted evidence." *Id.* at 694 n.5. On remand, the New York Court of Appeals held the *Crawford* error harmless. Pet. App. 1a. As the court put it: because the "evidence of [Hemphill]'s guilt was overwhelming," "there is no reasonable possibility that the erroneously admitted plea allocution might have contributed to defendant's conviction." Pet. App. 4a (quotation omitted).

Hemphill now returns to this Court to protect his initial victory and remedy the violation of his Sixth Amendment right of confrontation. The Court should grant Hemphill's petition and reverse.

SUMMARY OF ARGUMENT

The state and lower federal courts are hopelessly divided over how to conduct harmless error review. The court below, and many others, focus on whether the evidence—minus whatever portion was wrongly admitted—supports the conviction beyond a reasonable doubt, usually by finding that evidence "overwhelming" (and thus that the error was harmless). A larger number of courts focus on the error, asking whether it likely affected the verdict. This conflict is entrenched and calls out for this Court's resolution.

Amicus submits that the "overwhelming evidence" approach to harmless error analysis usurps the function of the jury, effectively making the appellate court —which sees only a cold record—the ultimate arbiter of guilt. Asking whether the error likely affected the verdict, by contrast, ensures that the appellate role is properly limited to reviewing the trial error and remedying the error whenever it might have led *the jury* to a different outcome. As the Court held in *Chapman* v. *California*, 386 U.S. 18, 22 (1967), the purpose of the harmless error doctrine is not to sideline the jury, but to avoid "setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial."

The decision below falls on the wrong side of this divide. It fails to understand the process for assessing the harmfulness of Confrontation Clause violations that this Court laid out in *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986). On finding the evidence against Hemphill "overwhelming"—a bizarre conclusion on these facts, but not the issue on certiorari—the court gave only perfunctory treatment to the factors that

other courts consider in assessing whether the constitutional error had an effect on the verdict. That error is particularly egregious in the context of the Confrontation Clause, which as this Court reaffirmed in this very case is not a matter for balancing, but a fundamental constitutional rule that must be obeyed. It would be paradoxical for this Court to give the Clause such an uncompromising reading in *Hemphill I*, only to allow an appellate court to excuse the error in *Hemphill II*, on the flimsy ground that the court thought the evidence strong enough anyway. Such a rule would incentivize prosecutors to risk Confrontation Clause violations secure in the knowledge that, even if held unconstitutional, they will not result in reversal of the conviction.

This case is a compelling vehicle for addressing harmless error review, which affects a host of cases annually. The Court is already familiar with the facts; the decision on remand perfectly tees up the most pressing questions about harmless-error review; and the logical integrity of this Court's prior opinion depends on correcting the decision below. Certiorari should be granted.

REASONS FOR GRANTING THE PETITION

The decision below both deepens an entrenched split over how appellate courts should conduct harmless-error review and conflicts with this Court's precedents. Moreover, this case provides an outstanding opportunity to clarify that courts conducting such review—which disposes of more criminal cases than any other doctrine—must consider not only whether the error tainted the government's "overwhelming evidence of guilt," but also its likely effect on how the jury viewed *the defense*.

I. Lower courts are intractably divided over how to conduct harmless-error review.

In 2011, this Court granted certiorari in *Vasquez* v. *United States*, 565 U.S. 1057 (2011), to address a circuit split over the correct harmless-error test. *Vasquez* was dismissed as improvidently granted, 566 U.S. 376 (2012), but the split has only deepened.

A. The federal circuits are hopelessly divided over how to conduct harmless-error review.

1. Eight circuits apply an effect-on-the-verdict test that considers not simply "the strength of the prosecution's case," but whether the error "had a substantial and injurious effect." *Wray* v. *Johnson*, 202 F.3d 515, 526 (2d Cir. 2000); see *United States* v. *Cudlitz*, 72 F.3d 992, 999 (1st Cir. 1996); *Virgin Islands* v. *Martinez*, 620 F.3d 321, 338 (3d Cir. 2010); *United States* v. *Ibisevic*, 675 F.3d 342, 350 (4th Cir. 2012); *Reiner* v. *Woods*, 955 F.3d 549, 557 (6th Cir. 2020); *United States* v. *Caruto*, 532 F.3d 822, 831 (9th Cir. 2008); *United States* v. *Makkar*, 810 F.3d 1139, 1148 (10th Cir. 2015); *United States* v. *Cunningham*, 145 F.3d 1385, 1394 (D.C. Cir. 1998).

Under this approach, courts assess "the closeness of the case," yet "the strength of the Government's case does not, in itself, resolve the 'closeness' question." *Ibisevic*, 675 F.3d at 354. Courts ask whether the case was "close" in light of the "government's case" *and* the "evidence supporting [the] defense." *United States* v. *Bailey*, 696 F.3d 794, 805 (9th Cir. 2012). This entails considering the defendant's "testimony on his own behalf." *United States* v. *Ofray-Campos*, 534 F.3d 1, 28 (1st Cir. 2008). In *United States* v. *Johnson*, 617 F.3d 286, 298 (4th Cir. 2010), for example, the court held

an error not harmless after assessing both "the government's case" and "the fact that [the defendant] testified in his own defense as well as called numerous witnesses to support his innocence."

The circuits that take this approach recognize that an error was likely harmful if it "'bears on an issue that is plainly critical to the jury's decision,' such as the defendant's credibility" if "central to her defense." *United States* v. *Jean-Baptiste*, 166 F.3d 102, 108 (2d Cir. 1999) (citation omitted); see also *Caruto*, 532 F.3d at 832 ("[A] constitutional error that goes directly to the defendant's credibility usually is not harmless where the defendant's theory of the case is plausible, even if it is not particularly compelling."). Likewise, an error was likely harmful if "material to the establishment of [a] critical fact," "emphasized in arguments to the jury," or not "corroborated and cumulative." *Wray*, 202 F.3d at 526.

Indeed, many circuits examine the error's harmfulness in light of key disputed issues. As then-Judge Gorsuch wrote for the Tenth Circuit, "[w]hen an error deprives a defendant of 'important evidence relevant to a sharply controverted question going to the heart of [the] defense, * * * substantial rights [are] affected.'" *Makkar*, 810 F.3d at 1148 (citation omitted). Errors are also important if they "directly undermin[e] the plausibility of [the] defense." *Gov't of Virgin Islands* v. *Davis*, 561 F.3d 159, 167 (3d Cir. 2009). In assessing the error's harmfulness, whether "overwhelming" evidence establishes "several elements" of an offense matters little when "the central point of contention" is disputed. *United States* v. *Stewart*, 907 F.3d 677, 691 (2d Cir. 2018); see *id.* at 688 (considering "the

presence or absence of evidence corroborating or contradicting the government's case on the factual questions at issue").

These circuits likewise consider other telltale signs that the error may have affected the verdict, including whether "[t]he district court recognized" the issue's importance (*United States* v. *Morris*, 988 F.2d 1335, 1341–1342 (4th Cir. 1993)), whether the prosecution acknowledged the evidence's significance (*Makkar*, 810 F.3d at 1148), or whether the evidence was emphasized "during closing argument" or the "jury's conduct" (*Reiner*, 955 F.3d at 557).

At bottom, these circuits "'demand[] a panoramic, case-specific inquiry considering, among other things, the centrality of the tainted material, its uniqueness, its prejudicial impact, the uses to which it was put during the trial, the relative strengths of the parties' cases, and any telltales that furnish clues to the likelihood that the error affected the factfinder's resolution of a material issue.'" *United States* v. *Carrasco*, 540 F.3d 43, 55 (1st Cir. 2008) (citation omitted). As the D.C. Circuit has explained, any other approach is "'inconsistent with'" defendants' "'right to have juries, not appellate courts, render judgments of guilt or innocence.'" *Cunningham*, 145 F.3d at 1394 (citation omitted).

2. By contrast, other courts conducting harmless-error analysis rely on the strength of the prosecution's case to the exclusion of other important factors. While courts in every circuit have considered the strength of the government's case in finding errors harmless, the Fifth, Eighth, and Eleventh Circuits, among others, frequently rely solely on "overwhelming evidence" of guilt. *E.g.*, *United States* v. *Staggers*, 961 F.3d 745,

760 (5th Cir. 2020) (finding "error was harmless, because there was overwhelming evidence of [defendant's] guilt"); *United States* v. *Ramos-Rodriguez*, 809 F.3d 817, 824 (5th Cir. 2016); *United States* v. *Erickson*, 610 F.3d 1049, 1054 (8th Cir. 2010); see also, *e.g.*, *United States* v. *Garcia-Lagunas*, 835 F.3d 479, 501–506 & n.5 (4th Cir. 2016) (Davis, J., dissenting) (criticizing majority for "fundamental error" of relying on "'overwhelming evidence of guilt alone'" (citation omitted)); *United States* v. *Nash*, 482 F.3d 1209, 1222 (10th Cir. 2007) (McKay, J., dissenting) (criticizing majority for relying on "its laundry list of properly admitted evidence—much of it contested[—]to establish Defendant's guilt," and for ignoring "the most significant part of the standard," the error's likely "prejudicial effect * * * upon the jury").

In the Eighth Circuit, for example, "[e]vidence erroneously admitted in violation of the Confrontation Clause is harmless beyond a reasonable doubt as long as the remaining evidence is overwhelming." *United States* v. *Taylor*, 813 F.3d 1139, 1149–1150 (8th Cir. 2016). These circuits have also relied on overwhelming evidence in "declin[ing]," for example, "to give * * * any weight" to a defendant's testimony deemed "self-serving." *United States* v. *Skilling*, 638 F.3d 480, 484 (5th Cir. 2011); see *United States* v. *Elliott*, 89 F.3d 1360, 1369 (8th Cir. 1996) (relying solely on "the weight of the government's massive case").

Similarly, Eleventh Circuit precedent "is thick with decisions" finding errors harmless based on "overwhelming evidence." *United States* v. *Pon*, 963 F.3d 1207, 1240 (11th Cir. 2020) (collecting cases). In one telling case, that court relied on its "long line of precedent" holding that "overwhelming evidence of guilt suffices to demonstrate" harmless error in

brushing off an error admitting evidence that a "key [defense] witness[]" had accepted a bribe from the defendant to give perjured testimony. *United States* v. *Baptiste*, 935 F.3d 1304, 1308, 1314 (11th Cir. 2019). In so holding, the court considered neither the prejudice of undermining a "key [defense] witness" nor the inference of guilt that a jury might draw from evidence that a defendant suborned perjury. *Ibid.*

B. The state appellate courts are equally divided over how to conduct harmless-error analysis.

1. State courts too are divided. Many state high courts expressly reject reliance on overwhelming evidence of guilt at the expense of other factors informing the verdict's reliability. In Florida, for example, "'[o]verwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution's case may have played a substantial part in the jury's deliberation and thus contributed to the actual verdict.'" *Ventura* v. *State*, 29 So. 3d 1086, 1089 (Fla. 2010) (per curiam). The Texas Court of Criminal Appeals likewise "reject[s]" the "'overwhelming evidence of guilt' test," directing courts to consider "the source of the error, the nature of the error, whether or to what extent it was emphasized by the State," "its probable collateral implications," "how much weight a juror would probably place upon the error," and "whether declaring the error harmless would encourage the State to repeat it with impunity." *Higginbotham* v. *State*, 807 S.W.2d 732, 734–735 (Tex. Crim. App. 1991) (citation and quotation omitted). Montana and New Mexico's high courts agree. See *State* v. *Mercier*, 479 P.3d 967, 977 (Mont. 2021) ("'overwhelming evidence' absent the tainted evidence in favor of guilt will not alone suffice"); *State*

v. *Tollardo*, 275 P.3d 110, 122 (N.M. 2011) ("improper for 'overwhelming evidence" of guilt "to serve as the main determinant of whether an error was harmless").

2. Other state courts, in contrast, rely on the presence of overwhelming evidence. Under Washington's "'overwhelming untainted evidence' test," courts "look to the untainted evidence to determine if it was so overwhelming that it necessarily leads to a finding of guilt." *State* v. *Lui*, 315 P.3d 493, 511 (Wash. 2014). In New Hampshire, if "properly admitted evidence" is "of overwhelming weight," the government has "met its burden to prove" constitutional errors harmless. *State* v. *Wall*, 910 A.2d 1253, 1262 (N.H. 2006). Likewise, in North Carolina, error is harmless if "the independent non-tainted evidence is 'overwhelming.'" *State* v. *Peterson*, 652 S.E.2d 216, 222 (N.C. 2007). Colorado and Connecticut law are similar. *Bartley* v. *People*, 817 P.2d 1029, 1034 (Colo. 1991); *State* v. *Shifflett*, 508 A.2d 748, 752 (Conn. 1986).

3. As exemplified by the decision below, the New York courts may be the most confused and inconsistent of all. While aspects of its analysis feint in the direction of an effect-on-the-verdict test, the Court of Appeals emphasized the State's overwhelming evidence to the exclusion of any other serious consideration. The court recognized that the question of who fired the 9-millimeter was the "primary disputed issue" at trial (Pet. App. 2a; cf. *Jean-Baptiste*, 166 F.3d at 108). It considered whether Morris's testimony that he possessed a .357 was cumulative of Gilliam's statement of the same fact[1] (cf. *Carrasco*, 540 F.3d at

[1] Conspicuously failing to note that Gilliam had initially testified to the opposite.

55) and took note of the degree to which the prosecutor relied on the erroneously admitted evidence (cf. *Reiner*, 955 F.3d at 557). Pet. App. 4a. But despite acknowledging the centrality of the issue, it concluded that the erroneous admission of testimony bearing on that same issue was harmless, based primarily on "other, overwhelming evidence of [Hemphill's] guilt." Pet. App. 4a.

Rationally speaking, the court below may be right that evidence that Morris pled guilty to a lesser offense should have had little bearing on whether he had in fact pulled the trigger. See Pet. App. 4a ("[t]he plea allocution neither exculpated Morris nor inculpated [Hemphill].") But the prosecutor did not think so, and in light of his misleading use of that evidence to prove that Morris' *actual crime* was mere possession, it cannot be presumed that the jury saw the flaw in the prosecutor's argument. That is why this is a textbook case of why the two approaches to harmless error can make a difference. Focusing solely on the unconstitutionally admitted evidence, the admission of Morris's allocution does not really count for much. But when one considers how the prosecution used that evidence, and its probable effect on the jury, the wrongly admitted hearsay might well have been decisive.

In other cases, by contrast, the New York Court of Appeal has cautioned that "'however overwhelming may be the quantum and nature of the other proof, the error is not harmless * * * if 'there is a reasonable possibility that the * * * [error] might have contributed to the conviction.'" *People* v. *Hardy*, 824 N.E.2d 953, 957–958 (N.Y. 2005) (citations and quotations omitted). One simply does not know, from one case to the next, how the New York courts will act.

That confusion directly affects the fair administration of justice. "When courts are confused, the defendant may be deprived of protection." Anne Bowen Poulin, *Tests for Harm in Criminal Cases: A Fix for Blurred Lines*, 17 U. PA. J. CONST. L. 991, 1016 (2015). Where criminal defendants' "liberties hang in the balance," this Court should not allow "confusion in the lower courts and conflicting results" to prevail. *Wooden* v. *United States*, 142 S. Ct. 1063, 1080 (2022) (Gorsusch, J., concurring in the judgment).

II. The decision below conflicts with this Court's precedents.

As the decision below illustrates, state and lower federal courts have drifted dramatically from this Court's harmless-error precedents, which strike a balance between the defendant's right to a jury trial and concerns about reversing judgments based on "hypertechnicalit[ies]." *Kotteakos* v. *United States*, 328 U.S. 750, 759 n.14 (1946). This Court strikes that balance by asking whether the error potentially "contribute[d] to the verdict obtained." *Chapman*, 386 U.S. at 24. Errors that "make [the defendant's] version of the evidence worthless, can no more be considered harmless than" a "coerced confession." *Id*. at 25–26.

A proper analysis considers all relevant factors—not just the perceived strength of the government's case—giving deference to the jury's role. And where appellate courts fail to consider whether errors might have undermined the jury's belief in the defense's case, they are reduced to "appellate speculation about a hypothetical jury's action." *Sullivan* v. *Louisiana*, 508 U.S. 275, 280 (1993). "The Sixth Amendment requires more." *Ibid*.

A

The "most important element" of the jury trial right is "the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.'" *Id.* at 277. Thus, proper harmless-error analysis must ask "what effect [the error] had upon the guilty verdict." *Id.* at 279. Such harmless-error review targets "the basis on which 'the jury actually rested its verdict.'" *Ibid.* (citation omitted).

"The inquiry," therefore, "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *Ibid.* Rather than sitting as "a second jury," courts must "ask[] whether the record contains evidence that could rationally lead to a contrary finding." *Neder* v. *United States*, 527 U.S. 1, 19 (1999). "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error." *Kotteakos*, 328 U.S. at 765.

Time and again, this Court and individual Justices have rejected "overemphasis" on "overwhelming evidence." *Chapman*, 386 U.S. at 23. As the Court explained in *Kotteakos*, a reviewing court's assessment of the defendant's "guilt or innocence" cannot be the "sole criteria for reversal or affirmance"—"[t]hose judgments are exclusively for the jury." 328 U.S. at 763. The question is whether "the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24. Simply put, a court "should not find harmless error merely because it believes that the other evidence is 'overwhelming.'" *United States*

v. *Hasting*, 461 U.S. 499, 516 (1983) (Stevens, J., concurring in the judgment). But a host of lower courts have not gotten the memo.

The requirement that courts consider more than the strength of the government's case stems from the very nature of harmless-error review itself. Those trial errors susceptible to review for harmlessness differ from structural errors precisely because they can "be quantitatively assessed *in the context of other evidence presented*." *Sullivan*, 508 U.S. at 281 (emphasis added). Reliance solely on the government's case does not account for the full context of all the other evidence presented. Cf. *United States* v. *Davila*, 569 U.S. 597, 612 (2013) (harmless- and plain-error analysis must be conducted in the "light of the full record").

When this Court has relied on "overwhelming evidence" to find an error harmless, therefore, it has typically done so based on "uncontested" evidence. *Neder*, 527 U.S. at 17. In *Hasting*, it was deemed harmless to permit a prejudicial prosecutorial remark where the government's case was "unanswered." 461 U.S. at 512. In *Harrington* v. *California*, 395 U.S. 250 (1969), the trial court committed a *Bruton* violation by admitting the testimony of co-defendants who placed themselves and the defendant at the scene of the crime. This was held harmless when the defendant admitted he was there. *Id.* at 253-254. Similarly, in *Schneble* v. *Florida*, 405 U.S. 427 (1972), the erroneously admitted testimony of a co-defendant placing the defendant at the scene of the murder was harmless when the defendant had confessed to the murder. *Id.* at 429-430. And even when the Court has relied on "'over-whelming evidence' of guilt," it has admonished "against giving [it] too much emphasis" (*Harrington*, 395 U.S. at 254 (citing *Chapman*, 386 U.S. at 23))—

and it has reversed harmless-error findings based on supposedly overwhelming evidence. *Arizona* v. *Fulminante*, 499 U.S. 279, 297 (1991); *Chapman*, 386 U.S. at 25.

The evidence here is anything but uncontested. All of the evidence that the government marshaled in support of its original prosecution of Morris counts as evidence against its later prosecution of Hemphill for the same murder. Gilliam's testimony that Hemphill pulled the trigger is contradicted by Gilliam's earlier testimony that Morris did so. The discovery of Hemphill's DNA on a blue sweater in Gilliam's possession could have multiple innocent explanations. In short, this is not a case in which uncontested evidence led to an ineluctable conclusion of guilt.

Because courts may not simply focus on the prosecution's "overwhelming evidence," proper harmless-error analysis requires considering "a host of factors." *Van Arsdall*, 475 U.S. at 684. In analyzing Confrontation Clause violations, "[t]he correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." *Ibid*. In undertaking that inquiry, the Court considers not only "the overall strength of the prosecution's case," but also "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, [and] the extent of cross-examination otherwise permitted." *Ibid*. "The crucial thing is the impact of the thing done wrong on the [jurors'] minds" in "the total setting." *Kotteakos*, 328 U.S. at 764. This

requires "consider[ing] all the ways that error can infect the [trial]." *Brecht* v. *Abrahamson*, 507 U.S. 619, 642 (1993) (Stevens, J., concurring).

B

No such analysis occurred below. The New York Court of Appeals began and ended its opinion with references to the "overwhelming" evidence of Hemphill's guilt. Pet. App. 1a, 4a. The court's approach is reflected in its own synopsis: "For the following reasons, we hold that the evidence of defendant's guilt was overwhelming and that the error was harmless." Pet. App. 1a. By the court's own account, its focus was on whether Hemphill was guilty (the business of the jury) rather than on whether the constitutional error had an impact on the verdict.

Although the Court of Appeals did recite some *Van Arsdall* factors, its treatment of them was perfunctory. Pet. App. 4a. In particular, the court did not explore the possibility—in *amicus*'s view, the likelihood—that an unsophisticated jury may have viewed the revelation that Morris had been convicted only of possession as a "gotcha" moment, discrediting Hemphill's self-serving attempt to turn Morris into the gunman. Coming as it did toward the end of the defense's case, and amplified by the prosecutor's arguments, it is difficult to fathom the conclusion that introducing this hearsay was a "small error[] or defect[] that ha[d] little, if any, likelihood of having changed the result of the trial." *Chapman*, 386 U.S. at 22. Nor did the court pay attention to the trial judge's observation regarding the centrality of this issue to the defense case. See

J.A. 185[2] (calling the defense strategy of pinning the murder on Morris "necessary" to the defense).

To be sure, from the abstract perch of the appellate bench, it may seem obvious that a plea bargain for a lesser charge in no way exonerated Morris, and thus should have had little impact on the balance of the evidence. But that is precisely *not* the proper inquiry. The question should not have been whether the appellate judges remained persuaded of Hemphill's guilt, but whether the Confrontation Clause error may have contributed to *the jury's* conclusion that Hemphill was guilty.

The New York Court of Appeals' "overwhelming evidence" test thus caused it to neglect the "host of factors" informing whether the error "'contribute[d] to the verdict.'" *Van Arsdall*, 475 U.S. at 684, 680 (citation omitted). Reviewing courts may not "look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because [they] think the defendant was guilty. * * * [J]uries alone" bear "that responsibility." *Weiler* v. *United States*, 323 U.S. 606, 611 (1945).

III. Proper harmless-error analysis is critical to protecting the rights of criminal defendants in a large number of cases.

As "probably the most cited rule in modern criminal appeals," the harmless-error standard is critical. William M. Landes, et al., *Harmless Error*, 30 J. LEGAL STUD.161, 161 (2001).

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[2] Citations to the J.A. are to the Joint Appendix in *Hemphill* v. *New York*, 142 S. Ct. 681 (2022) (No. 20-637).

Relying on appellate judges' view of supposedly overwhelming evidence risks usurping the jury's role and the defendant's jury-trial right. Judges "may not direct a verdict for the State, no matter how overwhelming the evidence." *Sullivan*, 508 U.S. at 277. As this Court has observed, the "promise" that "[o]nly a jury, acting on proof beyond a reasonable doubt, may take a person's liberty * * * stands as one of the Constitution's most vital protections against arbitrary government." *United States* v. *Haymond*, 139 S. Ct. 2369, 2373 (2019).

The jury trial right is thus "a fundamental reservation of power in our constitutional structure"—one "meant to ensure [juries'] control in the judiciary." *Blakely* v. *Washington*, 542 U.S. 296, 305–306 (2004); see also *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1397 (2020). But over-reliance on the government's case usurps juries' role by inviting appellate courts to make "independent conclusion[s] of guilt" (Gregory Mitchell, *Against "Over-whelming" Appellate Activism: Constraining Harmless Error Review*, 82 CAL. L. REV. 1335, 1340 (1994)) and risks transforming the reviewing court into "in effect a second jury to determine whether the defendant is guilty" (Roger Traynor, *The Riddle of Harmless Error* 21 (1970)). As this Court has put it, "the appellate court" must not take on "the jury's function of measuring the evidence [with] legal yardsticks." *Bollenbach* v. *United States*, 326 U.S. 607, 614 (1946).

Commentators across the spectrum agree that appellate courts are institutionally ill-equipped to weigh trial evidence. "[M]any events of trial pass without casting so much as a shadow upon the printed transcript," and appellate courts "cannot watch the demeanor of witnesses, listen to the intonations of their

voices, or engage in any of the countless other observations that inhere in an assessment of credibility." Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1193 (1995). "The difference between trying a case on the district level court and merely reading the briefs on appeal is only a little less marked than the difference between watching *Gone With the Wind* and reading the *TV Guide* description of it." Alice M. Batchelder, *Some Brief Reflections of a Circuit Judge*, 54 OHIO ST. L.J. 1453, 1453 (1993). As then-Judge Gorsuch once noted, harmless-error doctrine is not "license for rank speculation"; "[w]hen it comes to the loss of liberty, it is better to know on remand than guess on appeal." *United States* v. *Henry*, 852 F.3d 1204, 1209 n.3 (10th Cir. 2017).

Moreover, the nature of harmless-error review means review is always based on a record that has already led to the defendant's conviction. Poulin, *supra*, at 1024. As then-Professor (now Judge) Stephanos Bibas has noted, when "looking back at [that] final result," well-documented cognitive biases mean "courts might regard that outcome as inevitable." Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 3. Simply put, "confirmatory bias" makes it "just too hard for judges to screen out the fact of conviction." *Id*. at 3, 6. So if appellate courts at their best guess on harmless-error review, at their worst they habitually guess in the same direction.

Worse, over-reliance on the government's evidence incentivizes prosecutors to use questionable tactics, knowing they can be excused as harmless. See, *e.g.*, *Mitchell* v. *State*, 120 P.3d 1196, 1216 (Okla. Ct. Crim.

App. 2005) (prosecutor urged court to admit unconfronted hearsay because it would "only be reviewed for harmless error anyway"). Incentivizing such misconduct undermines the "public respect for the criminal process" that the harmless-error doctrine seeks to promote. *Van Arsdall*, 475 U.S. at 681.

IV. This case is an ideal vehicle for the Court to clarify the harmless error doctrine.

Although this Court often considers whether an error may be reviewed for harmlessness, it rarely undertakes that review itself, "ordinarily leav[ing] it to lower courts to pass on the harmlessness of error in the first instance." *Ring* v. *Arizona*, 536 U.S. 584, 609 n.7 (2002); *Hemphill*, 142 S. Ct. at 693 n.5. Here, that first instance has occurred. The court below has found the underlying error harmless, and the issue is ripe for this Court's review. Furthermore, this Court is already well-acquainted with the facts of the case.

In addition, the coherence of this Court's prior decision is on the line. That decision rested on the premise that Morris' plea allocution was introduced to establish Hemphill's guilt by suggesting "that possession of a .357 revolver, not murder, was the crime [Morris] actually committed" (*id.* at 688 (quotation omitted)), thereby "rebut[ting] Hemphill's theory that Morris committed the murder" (*id.* at 686). Were that not so, and Morris's testimony did nothing to inculpate Hemphill, it would have been inadmissible "under ordinary principles of evidentiary relevance." Daniel Epps, *The Right Approach to Harmless Error*, 120 COL. L. REV. F. 1, 4 (2020). Indeed, this Court specifically rejected the dissent's view that no confrontation issue was properly before it. *Hemphill*, 142

S. Ct. at 689 n.2. Under these circumstances, the notion that the "[t]he plea allocution neither exculpated Morris nor inculpated [Hemphill]" retroactively leaves this Court's decision a nullity. Pet. App. 4a. The Court should not allow the court below to render its prior opinion advisory.

CONCLUSION

Darrell Hemphill is serving a sentence of 25-years-to-life on an evidentiary record so thin that the State initially tried another man for the crime. Nevertheless, the court below thought the evidence of his guilt was so "overwhelming" that it could excuse a violation of his Sixth Amendment right to confront his accusers confirmed by this Court. The absurdity of that result is the inevitable byproduct of a harmless-error doctrine in dire need of this Court's attention. Certiorari should be granted.

Respectfully submitted,

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